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No. 96-1991

**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term 1996

EDDIE LINN SWAFFAR, JR., Petitioner

V.

W. C. SWAFFAR, EXECUTOR, Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT**

BRIEF IN OPPOSITION

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29 pp

QUESTION PRESENTED

Whether Petitioner is entitled to Fourteenth Amendment due process protection and relief where there is insufficient state action and where Petitioner had a full and fair opportunity to litigate the matters he now claims were incorrectly barred from appellate review by the Arkansas Supreme Court?

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TO THE HONORABLE SUPREME COURT:

The Respondent, W.C. Swaffar, respectfully requests that This Court deny the Petition for Writ Of Certiorari submitted by Petitioner, Eddie Linn Swaffar, Jr.

STATEMENT OF THE CASE

Respondent adopts the statement of the case as set forth by the Arkansas Supreme Court in its Opinion on this matter. See Appendix to Petitioner's Brief at 1a. *Swaffar v. Swaffar*, 938 S.W.2d 552 (Ark. 1997).

REASONS FOR DENYING THE WRIT

There Is No State Action Involved

The Petitioner alleges no *state action* which would warrant the application of the Fourteenth Amendment guarantees of due process of law. The Fourteenth Amendment protects a property interest only from a deprivation by state action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). The Petitioner alleges that the Respondent, *as executor*, failed to provide him notice of the filing of petitions for authority to pay attorneys' and executor's fees and notice of the entry of an order concerning Petitioner's obligation to pay rent to the estate resulting from a hearing in which Petitioner's counsel attended and participated. Although the executor was appointed pursuant to state law, namely Ark. Code Ann. §28-40-119 (1987), the enactment of which is a state action, the actions complained of by the Petitioner are acts

of a private party and the State's involvement falls far short of the type of state action required to invoke the guarantees of the Due Process Clause. The State's involvement in the running of the limitations period established by Ark. Code Ann. §28-1-116(d) (1987) is not sufficient to implicate due process. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Nor is private use of a State procedure or remedy a state action sufficient to make the implication. *Short*, *supra*, and *Brooks*, *supra*.

Petitioner Had A Full and Fair Opportunity to Litigate and the Arkansas Supreme Court Reached the Correct Result

The Petitioner had a full and fair opportunity to litigate the merits of the issue he now presents and the Arkansas Supreme Court reached the correct decision on the issue. Petitioner is unpersuasive in his attempt to align his argument with this Court's decision in *Tulsa Collection Servs. v. Pope*, 485 U.S. 478 (1988). *Pope* involved a

probate non-claim statute which foreclosed a creditor's claim against an estate *ab initio* if such claim was not presented within two months of the publication of the notice. *Id.* at 479. There is no similarity here as Petitioner had a full and fair opportunity to litigate the merits of each and every issue he now attempts to raise with this Court.

Since this probate proceeding was commenced in 1989, Petitioner litigated innumerable issues including a full trial on the merits to contest the decedent's will and to determine the existence of a pretermitted heir and a subsequent appeal of that decision. *Swaffar v. Swaffar*, 827 S.W.2d 140 (Ark. 1992). Additionally, on his Objection to Final Accounting of Executor the Petitioner had a full hearing during which he had an *opportunity* to present evidence on every issue of which he now seeks review. The probate court rejected these arguments

resulting in another appeal to the Arkansas Supreme Court which Petitioner alleges provides the basis for this Writ. *Swaffar v. Swaffar*, 938 S.W.2d 552 (Ark. 1997).

Petitioner appears to place great significance on the fact that Ark. Code Ann. §28-1-116(d) was not raised by Respondent before the probate court. See Petitioner's Brief at page 8. However, section 28-1-116(d) is a statute which precludes probate issues from being considered by an appellate court which were not properly preserved with the trial court. By its very design and purpose, section 28-1-116(d) is not applicable until issues are appealed. Petitioner, nonetheless, is charged with knowledge of the statute. Respondent prevailed on all objections to his final accounting and there was clearly no reason for this statute to be raised by Respondent until an appeal ensued. Moreover, under Arkansas law, if the trial court reaches the right result for the wrong reason the decision will not

be disturbed on appeal. *In Re: Estate of F.C.*, 900 S.W.2d 200 (Ark. 1995).

Furthermore the Petitioner does not allege that he discovered the entry of the orders outside the 60-day objection time nor that he had no actual knowledge of the entry of the orders at the time he filed his Objection or by the time it was heard. The Petitioner, knowing of the entry of the orders and complaining of their entry without notice to him at the hearing, merely failed to make his proof that the attorneys' and executor's fee were unreasonable or excessive and should not have been allowed. (R. 392-393).

As to the attorneys' and executor's fee issue, it is clear from the Opinion that all fees awarded to Respondent and attorney, Phil Stratton, were indeed considered by the Arkansas Supreme Court. The Court held, however, that *Petitioner presented no evidence to show why these fees were in any way unreasonable or excessive*. See Appendix

to Petitioner's Brief at 11a-12a. The burden of proof is always placed on the party challenging such fees under Arkansas law and the award is discretionary with the probate court. *Morris v. Cullipher*, 816 S.W.2d 878 (Ark. 1991).

As to Petitioner's argument on the rent imposed upon him for occupying estate property, it is undisputed that counsel for Petitioner was present and presented argument at the hearing before the probate court and counsel for Petitioner could have filed an objection or motion for rehearing at any time after the decision was announced in Court. (R. 87-89; 391-392). Relying on section 28-1-116(d), the Arkansas Supreme Court refused to consider this issue because these required procedures were not followed.

All of these issues were fully presented to the probate court over the long history of this estate

proceeding. Petitioner has failed to show the decision of the Arkansas Supreme Court was in any way erroneous.

Petitioner Failed to Preserve the Issue on Appeal

The Petitioner's Objections to Final Accounting of Executor filed July 8, 1995, which is included (without exhibits) in Respondent's Appendix at (1a), does not raise the specific question now presented; it was never raised in this form at the trial court during the hearing on the Objection; and it was only raised to the Arkansas Supreme Court in Petitioner's Reply Brief although not in his original brief to the Arkansas Supreme Court. (Appellant's Reply Brief 6-7). The Arkansas Supreme Court will not consider even Constitutional arguments raised for the first time on appeal. *Morrison v. Jennings*, 943 S.W.2d 559 (Ark. 1997). The Objection of the Petitioner questioned attorneys' fees paid in 1994 and 1995 and the Petition for Writ objects to attorneys' fees paid in 1991 and 1992. The

Petitioner has therefore *failed to raise and preserve this issue* for appeal.

Petitioner's Question Is Not of Significant Public Importance and Could Not Frequently Recur

The Petition for Writ of Certiorari should be denied because the facts presented are specific to this individual case and are not likely to recur. While the facts demonstrate this issue may have individual significance to Petitioner, there is nothing to show these facts will be repeated or that a decision on the merits of this case would have any effect on probate proceedings or the public interest. *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

CONCLUSION

The Petition Writ of Certiorari should be denied as it does not satisfy any of the reasons this Court considers in exercising its discretion as provided by Rule 10 of this Court. The Petitioner has alleged no state action sufficient

to implicate the Due Process Clause of the Fourteenth Amendment. The Petitioner had a full and fair opportunity to litigate the question now presented and the Arkansas Supreme Court reached the correct decision. The Petitioner failed to previously raise and preserve the question on appeal. The question presented is not of significant importance to public interest or effective probate administration to warrant United States Supreme Court review.

Respectfully submitted,

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APPENDIX

Page

Objections to Final Accounting
of Executor . . . . . (1a)

IN THE PROBATE COURT OF FAULKNER COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF EDDIE LINN SWAFFAR, DECEASED NO. PR 89-63

OBJECTIONS TO FINAL ACCOUNTING OF EXECUTOR

Eddie Linn Swaffar, Jr., contestant, who is interested in the estate of Eddie Linn Swaffar, deceased, as one of decedent's two heirs at law, by J. R. Nash, his attorney, files these exceptions and objections to the final accounting of W. C. Swaffar, the executor of the decedent, filed on or about July 6, 1995:

1. Contestant particularly objects to the failure and refusal of the executor to include in the Schedule A. Charges to Accountant those assets of Eddie Linn Swaffar, deceased, shown on the list titled "Items not included in inventory" which was information obtained from the executor's representative and which shows various assets of Eddie Linn Swaffar, deceased, at the time of his death and

which the executor has consistently refused to include in the estate. In spite of contestant's efforts through this court and through the Circuit Court of Pulaski County to force the executor to include all of these items as estate assets, none of the "right of survivorship bank accounts" section of said list is shown as an asset of this estate as they rightfully should be. A copy of said list is attached hereto as Exhibit A. Since each of these items, without question, was an asset of Eddie Linn Swaffar, deceased, at the time he died then the burden is on the executor to show that the property does not belong to his heirs. See McDermott vs. McAdams, 268 Ark. 1031, 598 SW2d 427 (1980), wherein the Arkansas Supreme Court charged that a "gift" claimed by an executor such as in this case requires that it be "scrutinized with the most jealous care." Clearly, this is the case with the C.D. valued at $54,986.40 which the executor has claimed for himself as well as the C.D.

valued at $40,180.84 which the executor has awarded to Brandon Swaffar, the only other heir.

2. Contestant particularly objects to the following items included under Schedule A. Charges to Accountant:

a. Balance remaining in hands of accountant on 5/30/94. The item is vague and is based on vague and inaccurate accountings filed previously by the executor which do not identify precisely what assets are included in the estate or where they came from. And, "As long as an administration is pending, it is the duty of the probate court, even in the absence of exceptions, to inquire into an account filed and to require the personal representative to account for all funds coming into his hands." See Price vs. Price,Adm'x, 253 Ark. 1124, 491 SW2d 793 (1973).

b. Accrued rent through May, 1995. This item does not indicate what property this rent is for nor who owes the rent and what period of time is involved. It is

impossible for anyone reviewing this accounting to determine the validity of this item and contestant demands more definite and certain information.

c. Sale of horses and head chute by Eddie, Jr. This item does not indicate if the executor received this amount of money directly or whether it is a charge against Eddie Linn Swaffar, Jr. as a distribution. Contestant demands more definite and certain information.

d. Increase in value of real estate. Contestant supposes this is the difference between the value of the real property put back into the estate under court order as appraised by the executor versus the value set by the Board Of Commissioners appointed by the court during August of 1995. If that is incorrect then contestant demands more definite and certain information.

3. Contestant particularly objects to the following items included under Schedule B. Credits to Accountant:

a. Credits for Barber Law Firm for October 1994, and December 1994. Mr. Stratton, the attorney for the executor, petitioned the court in 1989 to associate another attorney because he was in the process of retiring and could not handle the matter on his own. Subsequently, four lawyers from Barber Law Firm assisted Mr. Stratton, and they have already charged and been paid over $18,000.00. There is no information furnished by the executor as to what these charges are for, why more help was necessary, and whether they were authorized by the court. Contestant demands more definite and certain information.

b. Credits for Phil Stratton (attorney fee of $19,537.75) and W.C. Swaffar (executor fee of $9,780.33). As above noted, Mr. Stratton early on represented to the court that he was in the process of retiring. Other attorneys doing his work have already been paid $18,000.00 and have additional payments pending of

at least $1,700.00 for some recent unknown work for the executor. Accordingly, if Mr. Stratton's fee has any statutory basis then it should be reduced by what has already been charged to the estate for legal representation of the executor. The record does show that during the will contest, the executor had five lawyers in the courtroom representing his interest. Also, the record does show that both the executor and his attorneys have fought hard to keep the value of this estate at a low level and they should not now be awarded more than forty thousand dollars in legal fees and ten thousand dollars in executor fees for failing in that effort. The contestant demands more definite and certain information on these credits and the opportunity to question the claimants.

c. Credit for Faulkner County Title in the amount of $677.00. This item should have been paid by the purchaser of property from the estate and not by the estate.

Contestant demands more definite and certain information.

4. Contestant particularly objects to the following items included under Schedule C. credits for money paid or assets delivered to distributees:

a. Credit for prior distribution to Eddie Swaffar, Jr. plus accrued rent and proceeds from sales of estate property - $98,636.40. After a deduction from this figure in the amount of $17,800.00 for the purchase by Eddie Linn Swaffar, Jr. of the Conway Welding Company, his father's business, as ordered and approved by the court as an advancement, the remainder of $80,836.00 appears to be for rent on the shop building where the business was located and on an adjoining house where Eddie, Jr. and his wife have lived since his father's death. This item also gives the appearance of an actual distribution of funds to Eddie, Jr. and such is not the case. No funds have been dispersed to him. Rather, this is a grossly exaggerated

rental charge for occupying a thirty year old house for five years and a concrete block shop building for two years, both of which, together, were appraised at a total of $88,000.00 when Eddie Linn Swaffar, Sr. died six years ago. Moreover, a charge against Eddie Linn Swaffar, Jr.'s interest in this estate of $1,200.00 per month would have to be in direct conflict with the Will of Eddie Linn Swaffar, Sr. as of October 13, 1990 when Eddie Jr. purchased his father's business from the estate. According to the Will, Eddie, Jr. may rent the house and "shop" for a maximum of $1,200.00 a month if he so chooses. It is clearly a permissive benefit for an heir who was helping to run the business before Eddie, Sr. died. The "shop" is obviously an ongoing business with numerous assets of its own. Once Eddie obtained complete ownership of Conway Welding Company, the "shop" was his own except for the concrete block building where the business was located. A

copy of the Bill Of Sale for the business is attached hereto as Exhibit B.

Both the executor and his attorney are on record in court as acknowledging the true meaning of the term "shop" as used by Eddie Linn Swaffar, Sr. in his Will and the fact that $1,200.00 a month rent for the two physical structures (the house and the shop building) are inequitable and impractical. This is evident from the statements made by the executor's attorney at the hearing held before this court on December 19, 1989, when he described an agreement where Eddie Linn Swaffar, Jr. was to receive ownership of the business and the rent on the house and shop building was to be a total of $590.00 a month. A copy of a partial transcript of the hearing of December 19, 1989, is attached hereto as Exhibit C. A final note: this shop building was closed and given up to the executor in January of 1992, yet the executor, who failed to do

anything with this building since that time, wants to charge an heir an exorbitant rental fee based upon an admitted misinterpretation of the Will.

b. Fiduciary deeds to W. C. Swaffar , Trustee for the use and benefit of Eddie Linn Swaffar, Jr. and Brandon Swaffar as tenants in common. The so-called trusteeship of W. C. Swaffar is contrary to law since the Will of Eddie Linn Swaffar, deceased, calls for a passive trust which is already executed. The deeds should be directly to the heirs to reflect their ownership since the moment their father died. Also, no adequate legal description is given and confusion over what land is now included in this estate should be avoided at all costs. The contestant demands the opportunity to question the executor as to whether there is other property he knows about to be included in this estate and particularly whether there are any recorded or unrecorded deeds which apply to the interest of the heirs to

this estate.

c. Transfer to W. C. Swaffar, Trustee for the use and benefit of Eddie Linn Swaffar, Jr. and Brandon Swaffar remaining cash assets ($107,216.26). The charges shown here against the interest of Eddie Linn Swaffar, Jr. are based upon exaggerated rental charges and misconstruction of the Will as set out in the objection stated at paragraph 4 (a) above.

5. Contestant particularly objects to the failure of the executor to show any treatment in the final accounting for the claim of Eddie Linn Swaffar, Jr. for a set-off against any claims of the estate against him and for the claim of J. R. Nash for compensation from the estate for services rendered in behalf of Brandon Heath Swaffar.

6. Contestant particularly objects to the failure of the executor to show payments from the estate to or in behalf of Brandon Heath Swaffar as a distribution to said

heir.

7. Contestant reserves the right to timely supplement these objections and exceptions to the final accounting by the executor.

8. Contestant requests a hearing so that he may examine the executor on the noted objections and exceptions and to put on other evidence.

WHEREFORE, contestant, Eddie Linn Swaffar, Jr., respectfully requests that a hearing be held on the Final Accounting By Executor filed herein on or about July 6, 1995; that he be allowed to examine the executor on the noted objections and exceptions to said accounting and all other accountings filed herein; that the Final Accounting By Executor be disapproved and rejected; and that the court refer the account to a qualified auditor for examination and restatement.

Respectfully submitted,

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